Supreme Court, U.S.
FILED
FEB 14 1994
OFFICE OF THE CLERK

(3)

No. 93-796

SUPREME COURT OF THE UNITED STATES
October Term, 1993

Blaine A'mmon White, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY FOR THE PETITIONER TO THE BRIEF IN OPPOSITION

Blaine A'mmon White
3204 West Strathmore Avenue
Baltimore, Maryland 21215-3717
(410) 358-6443

TABLE OF CONTENTS

	Page
Opinions below.....	1
Jurisdiction.....	2
Statement.....	2
Argument.....	2
Conclusion.....	14

TABLE OF AUTHORITIES

Cases:

Ashe v. Swenson, 397 U.S. 436 (1970)..... 4, 8

Brown v. Ohio, 432 U.S. 161 (1977)..... 12

Harris v. Oklahoma, 433 U.S. 682 (1977)..... 12

Illinois v. Vitale, 447 U.S. 410 (1980)..... 12

In re Nielsen, 131 U.S. 176 (1889)..... 12

United States v. Aguilar-Aranceta, 957 F.2d 18 (1st Cir.), *cert. denied* (1992)..... 10, 11

United States v. Bailin, 977 F.2d 270 (7th Cir. 1992)..... 7

United States v. Dixon, 113 S.Ct. 2849 (1993) 12

United States v. Powell, 469 U.S. 57 (1984) 6, 11

United States v. Seley, 957 F.2d 717 (9th Cir. 1992) 7

United States v. White, 936 F.2d 1326 (D.C. Cir. 1991) 10

Constitution and statutes

U.S. Const. Amend. V (Double Jeopardy Clause) 13

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-796

Blaine A'mmon White, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY FOR THE PETITIONER TO THE BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 1 F.3d 13 (Pet. App. A2 - A27). The companion opinion of the court of appeals is reported at 936 F.2d 1326 (Pet. App. B2 - B23). The district court opinion is reported at 757 F.Supp. 45

(Pet. App. C2 - C31).

JURISDICTION

The jurisdiction of this court rests on Title 28 U.S.C. A § 1254 (1).

STATEMENT

Petitioner filed his petition for a writ of certiorari on November 19, 1993. The government requested and was granted two (2) extensions of time in which to file its in opposition; filed February 2, 1994. Petitioner received the government's opposition on February 4, 1994. Herein Petitioner files his reply.

ARGUMENT

1. The government advances two (2) reasons for denying further review of Petitioner's collateral estoppel claims; (1)..."that the jury acquitted defendant [Petitioner] by finding that the government failed to prove some fact that would not be necessary for conviction on

the count on which the jury failed to reach a verdict." (2)..."that the jury acquitted the defendant [Petitioner] by finding that the government failed to prove some fact that was necessary for conviction on the count which the failed to reach a verdict." (Opp.9-10) With respect to the government's first argument it contends that collateral estoppel does not apply. Regarding the government's second argument it contends that the verdict would be inconsistent. Both of the government's arguments are unavailing.

a. The government's initial position fails because it overlooks the fact that Petitioner had but one, single issue, defense as to all counts in both proceedings; lack of knowledge. (Pet. App. B13-B14, O4, P4-P8, and Q13). The government does not challenge the accuracy of Petitioner's, single issue, defense

assertion. Applying this Court's rationale in *Ashe v. Swenson* 397 U.S. 436 (1970) leads to the conclusion that the "ultimate" issue was knowledge, and that that issue was decided in Petitioner's favor. *Ashe* makes it clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. *Id. 444.* With all due respect to the district court, the tortured collateral estoppel analysis which it applied to Petitioner's case is the very type *Ashe*, cautions against. In addition, the evidence at Petitioner's first trial did not support the district court's analysis. If a court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the

defendant [Petitioner] did not contest, the possible multiplicity of [successive] prosecutions is staggering. ***In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel "...*Id.*, n.9, (Citations omitted). The kernel of this Court's admonition with respect to the application of the collateral estoppel rule is simplicity. The said simplicity is dependent upon actual circumstances rather than the hypothetical. Therefore, the only rational conclusion which can be reached in this matter is that the jury, by its acquittal of Petitioner upon the document fraud count, resolved the "ultimate" issue of knowledge in Petitioner's favor. In light of the fact that Petitioner's only defense in the second prosecution was again lack of knowledge, the government should have been

estopped from relitigating that issue. Thus, the Petitioner is entitled to have his petition for writ of certiorari granted.

b. The government's second argument turns a blind eye to the fact that unlike *United States v. Powell* 496 U.S. 57 (1984) the case at bar does involve inconsistent verdicts. There was no verdict reached on the second count of the initial indictment. The verdict of guilty against a Petitioner was returned by the subsequent jury. Therefore, the task of a reviewing court with respect to Petitioner's acquittal is to ascertain what effect the said acquittal had upon the retrial of Petitioner where again the only issue was lack of knowledge. The jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purpose of issue preclusion.

United States v. Bailin, 977 F.2d 270, 279-280 (7th cir. 1992), citing *United States v. Seley*, 957 F.2d 717, 723 (9th cir 1992). Moreover, "[t]he mere possibility that the jury acted irrationally, without more, will not negate the collateral estoppel effects [sic] of a prior verdict if a rational interpretation of the verdict as whole is possible." *Seley, Id., citing Pettaway* (citations ommitted). Thus, the inconsistent verdict issue is not applicable to the case at bar.

The government points out in its opposition that the court of appeals offered no explanation for the jury's acquittal of Petitioner with respect to the document fraud count. Opp. 11 n.1 and 14 n.2. Petitioner submits that he is entitled, at the very least, to an analysis of the collateral estoppel issue

by the reviewing court such that the legitimacy of said claim can be intelligently obtained. In Petitioner's view an analysis employing the principals of *Ashe, infra,* would lead to a conclusion that the "ultimate" issue (knowledge) was determined in Petitioner's favor by virtue of his document fraud acquittal. In light of the aforegoing, Petitioner is entitled to further review of his collateral estoppel claim upon a writ of certiorari.

c. The government suggests that there is "considerable tension" between the circuits as to application of the collateral estoppel doctrine. However, the government will not go so far as to admit that a conflict exists therein. Opp. 13. Petitioner calls the Court's attention to Webster's ninth edition, New Collegiate Dictionary, which defines "tension" as ...unrest...a state of latent

hostility or opposition between individuals or groups...,"Conflict" is defined, in that same volume, as ...antagonistic...divergent...ideas... discord... Therefore, Petitioner submits that the government is hiding behind semantics. The First Circuit and the District of Columbia Circuit hold views with respect to the application of the collateral estoppel doctrine which are divergent from, and in opposition to, the views held by the Seventh and Ninth Circuits respectively. Therefore, this court should grant certiorari so that the "tension" might be abated and the "conflict" resolved. Petitioner is entitled to a further review by this Court.

Furthermore, the government contends that the court of appeals holding in Petitioner's case was similar to that in

United States v. Aguilar-Aranceta, 957 F.2d 18 (1st Cir.), Cert. denied (1992) which followed and cited Petitioner's interlocutory appeal; *United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991). *Aguilar-Aranceta* is distinguishable from the case at bar on facts. In *Aguilar-Aranceta* there were two (2) issues involved in the acquitted count: "knowledge" and "willfulness", 957 F.2d at 25. The jury instructions therein required the government to prove both in order to obtain a conviction. The First Circuit in its collateral estoppel analysis considered these facts in reaching the conclusion that collateral estoppel did not apply. *Id.* By contrast at Petitioner's initial trial the only issue the government had to prove to obtain a conviction upon the document count fraud (upon which Petitioner was

acquitted) was Petitioner's "knowledge"; the other elements were admitted. The jury instructions in Petitioner's case reflect the fact that the only issue to be determined was "knowledge" with respect to both the document fraud **AND** the passport fraud counts. Pet. App. J2-J4. (Emphasis added.) Therefore, the only issue in controversy, and the only element that the government had to prove in the case in which Petitioner was acquitted was "knowledge." Thus, *Aguilar-Aranceta* is distinguishable from the case at bar. In *United States v. Powell, infra*, this Court held that juries are presumed to act rationally. The aforesaid presumption leads to the conclusion that since the jury had only one issue before it (knowledge) that that was the issue which the jury decided in Petitioner's favor. Therefore, Petitioner has met his burden

of proof and is entitled to the application of the collateral estoppel doctrine. Consequently, this court should grant Petitioner a writ of certiorari.

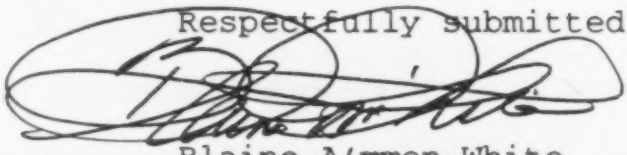
2. The government contends that Petitioner's double jeopardy claim is foreclosed by this Court's decision in *United States v. Dixon* 113 S.Ct. 2849 (1993). Opp. 15. Nevertheless, Petitioner contends that *Dixon* is not the final arbiter of Petitioner's double jeopardy claim. Petitioner submits that *Dixon* did not reverse *Illinois v. Vitale*, 447 U.S. 410 (1980), *Brown v. Ohio*, 432 U.S. 161 (1977), *Harris v. Oklahoma*, 433 U.S. 682 (1977) and *In re Nielsen* 131 U.S. 176 (1889). Based upon the line of precedent above, *Dixon* not withstanding, criminal defendants have additional double jeopardy protection. Therefore, a further review is warranted such that this Court might

give definition to what those protections are. Additionally, the government's opposition failed to address Petitioner's request for a special limiting jury instruction at his second trial with respect to his prior acquitted conduct. Pet. App. K 2. The court of appeals made no ruling as to the merit of Petitioner's jury instruction request which the district court denied. Petitioner is entitled to have the jury instruction issue resolved here. Petitioner submits that the unfettered use of prior acquitted conduct at his second trial violated Petitioner's Fifth Amendment protection against double jeopardy. Therefore, a further review is warranted and this Court should grant Petitioner a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Blaine A'mmon White

February 1994